

**U.S. Department of Labor**

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**Issue Date: 13 February 2006**

Case No. 2005 LDA 00070

OWCP No. 02-140950

*In the Matter of*

SCOTT RIDLEY,  
*Claimant*  
v.

MANTECH INTERNATIONAL CORPORATION,  
*Employer, and*

FIDELITY & CASUALTY COMPANY OF  
NEW YORK/CAN INTERNATIONAL,  
*Carrier.*

**Appearances:**

Gregory E. Camden, Esq., for Claimant  
Charlene Parker Brown, Esq., for Claimant  
Michael T. Quinn, Esq., for Employer  
Michael W. Thomas, Esq., for Employer

**Before:**

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding involves a claim for temporary total disability from an injury alleged to have been suffered by Claimant, Scott Ridley, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq* as extended to this case by the Defense Base Act, 42 U.S.C. § 1651, *et seq.* (Hereinafter referred to as the "Act"). Claimant alleges that he was injured while working in Iraq for Employer, Mantech International Corporation, and that as a result he is suffering from Post Traumatic Stress Disorder.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the

regulations issued thereunder. A formal hearing was held on November 17, 2005. (TR at 1).<sup>1</sup> Claimant submitted thirteen exhibits, identified as CX 1- CX 13, which were admitted without objection. (TR. at 18, 93). Employer submitted ten exhibits, EX 1 through EX 10, which were admitted without objection (TR. at 18). The record was held open for sixty days for the submission of post-hearing briefs. Claimant and Employer each submitted a brief on January 19, 2006.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## **ISSUES**

The sole issue are disputed by the parties is whether Claimant is entitled to temporary total disability benefits.

## **STIPULATIONS**

At the hearing, Claimant and Employer stipulated that:

1. An employer/employee relationship existed at all relevant times;
2. The parties are subject to the jurisdiction of the Defense Base Act;
3. The claimant alleges post traumatic stress disorder with a date of diagnosis of 01/21/05;
4. A timely notice of injury was given by the employee to the employer;
5. A timely claim for compensation was filed by the employee;
6. The employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;
7. The claimant's average weekly wage at the time of injury was \$2,174.44.<sup>2</sup>

## **DISCUSSION OF LAW AND FACTS**

### *Testimony of Claimant*

Claimant secured employment with Employer by posting his resume on an Internet site in 2004. (TR. at 20). Claimant was employed to work on "ADP equipment" in Iraq which

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<sup>1</sup> EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

<sup>2</sup> JX 1.

Claimant explained was, “automation data processing equipment, computers, laptops, desktops, printers.” (TR. at 20). Claimant noted that he had eight years of previous experience in this field. (TR. at 21).

Claimant testified that after he was hired, he went to El Paso, Texas, for “inoculations, health screenings, have your physicals, you receive whatever type of gear that you might need, gas mask.” (TR. at 22). Claimant testified that the physical was very thorough: “They did an audio and reflex – got reflexology and items of that nature.” (TR. at 22). Claimant noted that the doctor cleared him for duty. (TR. at 23). Claimant testified that he noted his health as “Good” on the Pre-Deployment Health Assessment questionnaire. (TR. at 62). Claimant also noted on this questionnaire that he had not previously sought counseling or care for his mental health. (TR. at 63). On cross, Claimant was asked about several doctors he consulted for help with his mental health, prior to the completion of this document. (TR. 63-66). Claimant responded that he did not recall previously seeking care for his mental health. (TR. at 65).

Following his physical, Claimant testified that “[Employer] trained us for a little bit on how to don our gas mask, and so forth, at El Paso. After that we flew to Kuwait.” (TR. at 23). After staying in Kuwait for approximately seven to eight days, Claimant testified that they then flew to Iraq to go to the duty station. (TR. at 24). Claimant recalled that he arrived in Iraq in early April of 2004. (TR. at 24).

Claimant testified that he went to Camp Anaconda, which is located in Balad, Iraq. (TR. at 24). Claimant described Camp Anaconda:

It was an old Iraqi air base. Sporadic bunkers all around, dust, dirt. You’ve got – everything is fenced in. You’ve got guards posted all – throughout the perimeter you’ve got guards posted.

(TR. at 24). Claimant estimated that the facility was approximately fifteen square miles. (TR. at 24). Claimant described his quarters at Camp Anaconda:

We slept in a tent, an aluminum frame tent with – it was like six other people.

[. . .]

We were right – initially we were approximately half a mile from the perimeter. Later on in the – what you might call the mast head we switched locations on the base itself. Then that put us right where the – just across the street from the dining facility. And that’s where we were supposed to get our new buildings and everything else.

(TR. at 25). Claimant described the problems that he experienced during his deployment to Iraq:

What bothered me is the mortars that – they come in, artillery rounds. Every time you would look down – you usually don’t know when you’re going to die, basically. They would walk mortars in, they have – I believe intel said that they

have a mortar or two on the back of a truck and there's a highway that runs on the backside of the base. They just start walking, walking meaning dropping mortars and they land in various different places on the base.

(TR. at 26.) Claimant noted that there were no mortar attacks during his first three weeks in Iraq, but after that, they occurred "everyday." (TR. at 26). Claimant explained:

They weren't on our little compound – well, they weren't on our compound within the base, but they were close enough to send shrapnel into our compound.

(TR. at 26). Claimant noted that he saw shrapnel in the compound "[r]oughly four times." (TR. at 56). Claimant estimated that the closest mortar attack hit fifty feet away from where he was standing. (TR. at 26). Claimant described this attack in detail:

I'd just heard – don't shoot in a straight line distance, because that was at the new site that we went to. It landed on our side of the street, which is where the dining facility was.

[. . .]

I was on my way out. I believe it was around 4:00, something like that, in the morning. I couldn't sleep. I had to be up early anyway, about like – we work till 6:00. So, anyway, I went to the trailer and I heard them start walking them mortars again. I got tired of hearing – tried of dealing with it and not knowing whether or not I'm going to die at that time, or if they were going to keep walking them toward me. As soon as I stepped foot on the concrete that's when a mortar blasted and I saw the glow, hear the sound and heard the shrapnel also. I kind of froze temporarily and then I went into the bunker and waited for approximately 10 – probably around 10 minutes.

(TR. at 26-7).

Claimant testified that he was also worried about uranium completion "because they have scavenger yards, would have a different broken down equipment, equipment that was destroyed or something of that nature." (TR. at 27). Claimant explained that "it's more or less me wanting to be tested to see if I had any exposure." (TR. at 58).

Claimant testified that he had difficulty obtaining protective ballistics gear:

We was supposed to be issued – we left – when I spoke to Dan Sears in Virginia he told me that we'd get ballistic gear, or body armor, in El Paso, I do believe. Got to El Paso they said, well, you'll get it in Kuwait. Then we got to Kuwait and they said you'll get it in Iraq. So, it took – I was pretty adamant about getting the ballistics gear.

(TR. at 28.) Claimant described ballistics gear as “armor plates that go in vest. They are made to stop a round the size of – that an AK 47 shots.” (TR at 28). Claimant noted that this gear can also protect against shrapnel. (TR. at 28). Claimant testified that he would wear this gear “when it’s mandated by the post commander, also wear it working at times, also traveling around the base, the installation I wear it as well.” (TR. at 29). Claimant testified that he received his ballistics gear approximately two weeks after his arrival in Iraq. (TR. at 59). Claimant explained that the base commander would mandate the ballistics gear “[i]f there is some sort of Intel provided to – I guess, provided to the post commander that there is a possible threat of insurgents or hostile action.” (TR. at 29). Claimant noted that the base commander mandated the ballistics gear approximately three times, each time lasting about two weeks. (TR. at 29).

Claimant admitted that he had run-ins with a supervisor during his time in Iraq:

He’s a retired – he retired from the Army and he’s an E7 in the Army and he was as senior NCO. He showed how the military works. My biggest complaint was he – his lack of safety – lack of concern for safety for other people. He lit a burn pit at dusk at our old compound, which was about half a mile from the perimeter which is nothing than a big target saying “shoot me.”

(TR. at 30).

Claimant acknowledged that he had been reprimanded by Employer during his time in Iraq:

I had been working in a trailer at the new compound – or relocated compound – and they told me we had to move the – that we had to move. I got this trailer I’m working in all by myself and I’ve got to move everything. I was using vulgar language, without a doubt, but they claimed I was throwing things around and stuff of that nature. I was merely – I was basically – a lot of stuff in there was trash that wasn’t needed anymore, old computer parts and stuff.

(TR. at 30).

Claimant testified that he was permitted to go to Hawaii to visit his wife from December 23, 2004 until January 12, 2005. (TR. at 31). Claimant testified that his mood was intense during this trip:

[A] few instances our next door neighbor’s kid, or it might have been the neighbors themselves, since my wife lives in base housing, they slammed a door and it sounded just like a mortar thump, when a mortar explodes. I just noticed my aggression was – my anger and aggression was extremely high. I was snapping at everybody and I didn’t know why, but that’s about it.

(TR. at 31).

Claimant testified that when he returned to Iraq, he found that the work had piled up during his vacation. Specifically, when he returned, “the whole floor of the building was covered with the printers that needed to be worked on or repaired.” (TR. at 32). Claimant testified that this incident upset him. (TR. at 32).

Claimant remained in Iraq for “roughly two more weeks.” (TR. at 32). Claimant noted that there were more mortar attacks during this time. (TR. at 32). Claimant testified that his resignation letter dealt with some safety issues:

I felt threatened – after coming back from Hawaii I felt threatened as far as, I guess, my awareness through coming back from Hawaii of how negligent it was. There was a communication breakdown somehow, someway, but the main concern was safety about the whole issue. It has always been safety.

(TR. at 33).

Claimant testified that he left Iraq on January 20, 2005. (TR. at 34-5). Claimant explained:

After Iraq I went back to El Paso to turn in whatever gear we had that we had withdrawn previously. Also went through a health screening, which is a part of the post-appointment. I went through a health screening. I expressed my concerns at that screening. Nothing was said. Nothing was done. Afterwards I went – left El Paso.

(TR. at 35). Claimant acknowledged that he filled out some forms during his post-deployment health screening. Claimant later clarified that he told this answers to somebody else, who filled the forms out on his behalf. (TR. at 43). Claimant acknowledged on these forms that he had an everyday fear of being killed throughout his deployment to Iraq. (TR. at 36). Claimant also noted that he had difficulty sleeping, and little interest and pleasure in doing things he had previously enjoyed since he returned. (TR. at 35-7). Claimant additionally noted that he was suffering from post traumatic stress disorder (“PTSD”). (TR. at 37). Claimant acknowledged on these forms that he was interested in receiving help for “stress, emotional, health or a family problem.” (TR. at 42). However, Claimant testified that he never received this help at that time. (TR. at 43).

Claimant testified that he subsequently sought treatment from Rock Landing Psychiatric Group. (TR. at 44). Claimant noted that he worked with Robert Kelly and Ed Whitaker at this facility. (TR. at 44, 45). A psychiatrist at the clinic prescribed Claimant Zoloft. (TR. at 45). Claimant also met with Dr. Chung “two or three times.” (TR. at 66).

In March of 2005, Claimant sought treatment from the VA Hospital in Hampton, Virginia. (TR. at 46). Claimant met with a nurse practitioner, and was taken off Zoloft, and put on Prozac. (TR. at 46). Claimant noted he was also prescribed Valium and Quetiapine. (TR. at 48).

Claimant moved to Charleston, South Carolina, on June 30, 2005. (TR. at 47). Claimant began treatment with Carol Thomas, an LPC. (TR. at 47). Dr. Pappas, Claimant's family practitioner, has continued his prescriptions he received at the VA hospital. (TR. at 48). Claimant recently also sought treatment from Dr. Book, who increased his prescription of Quetiapine. (TR. at 49). Claimant noted he is also on MS Contin for his shoulder pain, Percoset for his knees, and Fioricet for headaches. (TR. at 50).

Claimant testified to his current psychological problems:

Well, the anxiety is one of them that's – anxiety is the biggest one, hyper-vigilance and just a complete loss of everything. I want to go school to get a degree, a master's degree in oceanography, but I don't even want to go to school because it's too crowded of a place for me to go. I mean, the whole PTSD is just put a hamper on my life.

[. . .]

Some nights – well, some days I can sleep like 12 hours. Other days I only get like two hours of sleep. I've never had – I've had – never had that happen before ever. Appetite, I lost 30 pounds, which I'm just gaining back. I lost about 30 pounds when I was in Iraq.

(TR. at 53). Claimant also noted that he is bothered by loud noises, such as "fireworks, helicopters, jets, even like a tire exploding on a car." (TR. at 53). Claimant testified that he would not be able to return to work in Iraq. (TR. at 54).

#### *Medical Records from Rock Landing Psychological Group*

Claimant sought treatment from Robert Kelly, as Licensed Clinical Social Worker. (CX 1). Mr. Kelly's notes dated March 24, 2005 state:

[Claimant] is receiving services here for [PTSD]. Treatment began on 2/28/05 and is continuing weekly. Dr. Kelly Chun, Psychiatrist, will be providing ongoing medical management. I will be providing psychotherapy.

[Claimant] is advised to avoid stress and to reduce the stress level in his life as much as possible.

Bearing in mind that the course of PTSD is widely variable and unpredictable, it is estimated that [Claimant] would be able to resume employment in approximately six months to one year.

Short term prognosis is poor. With treatment, long-term prognosis is favorable.

(CX 1-8).

In drafting his opinion, Mr. Kelly:

[C]onsulted with my colleagues, Kelly Chun, MD and Edward Whitacre, LCSW. I also read the reports of Thomas Cobb, MD and the treatment notes of Carol Thomas, LPC, as well as the record from the Veteran's Administration Hospital.

(CX 1-2).

Mr. Kelly noted that he treated Claimant over the course of thirteen sessions from February 28, 2005 until May 23, 2005. (CX 1-3). Mr. Kelly noted that Claimant presented with "multiple anxiety symptoms including intrusive images, hyper-vigilance, and extreme startle response." (CX 1-3). Mr. Kelly noted that the last three symptoms "are not included in the APA, DSM IV criteria for any anxiety disorder other than Acute or Post Traumatic Stress Disorder." (CX 1-3).

Mr. Kelly opined on October 24, 2005:

During the course of treatment, [Claimant] described his experience as a contract worker in Iraq. It was clear that the longer he was there, the more stressed he became. From his description of his behavior during his Christmas visit at home, it was apparent that he was experiencing some PTSD symptoms already. It was unfortunate for him that he went back. Things only got worse, until they become intolerable. He developed an acute case of [PTSD].

From what [Claimant] described about himself and his past along with the information in Dr. Cobb's thorough review of [Claimant's] life, it is clear that [Claimant] has had long standing problems. Dr. Cobb is correct in assigning a personality disorder diagnosis and a substance abuse diagnosis. He is not correct in omitting a [PTSD] diagnosis. The life long problems that [Claimant] has had, his various problems in interpersonal relationships, and his history of prior treatment, indicate that [Claimant] had prior mental health related problems. However, they don't explain the acute PTSD symptoms that [Claimant] presented during his treatment with me. Those are the obvious result of his experience in Iraq.

Finally, it was clear to five professional mental health clinicians that [Claimant] suffers from [PTSD]; one has to wonder what prompted Dr. Cobb to arrive at different diagnosis.

(CX 1-3).

On October 24, 2005, Edward Whitacre, a Licensed Clinical Social Worker, noted that he had worked with Claimant during four sessions while his regular therapist was out of town. Mr. Whitacre opined:



My assessment of [Claimant] was that he showed clear symptoms of [PTSD]: recurrent intrusive recollections of images during his experience in the war zone, recurrent distress, dreams, hypersensitivity to internal and external issues symbolic of this traumatic experiences, feelings of estrangement from others, restricted range of affect, sense of foreshortened future, irritability, difficulty concentrating, difficulty sleeping. It was also clear, as well as acknowledged by [Claimant], that he used alcohol and other drugs to numb himself against his anxieties. [Claimant's] behavior is certainly affected by his substance abuse which also exacerbates his vulnerability to anxiety, but his substance abuse is not responsible for the chronic and specific symptoms of [PTSD].

(CX 1-5).

*Medical Records from Veteran's Administration*

Claimant was diagnosed with "chronic pain syndrome, migraines and shoulder impingement syndrome" on April 2, 2002, and sought a refill of pain medication. (EX 9). Over the course of his treatment, Claimant regularly sought refills for this medication. (EX 9). Claimant also complained of feelings of depression on November 19, 2002. (EX 9). Claimant had several follow-ups at the mental health clinic since November 19, 2002 through March 14, 2004. (EX 9).

On March 25, 2005, Claimant reported the following symptoms:

[I]ntrusive thoughts about incoming missiles and mortars 5 to 7 times per week; significant emotional distress when exposed to reminders of the Iraqi war, flashbacks to the combat zone when triggered by reminders such as noise from jets, helicopters, sirens. He also reported the arousal symptoms of consistent sleep disturbance, sustained irritability that is intermittently 'on the verge of being uncontrollable', marked hypervigilance that he describes as 'paranoid' by having to keep his back to the wall and scan the environment; increased startle response when hears a loud noise and sometimes actually dives for cover; panic episodes with increased heart rate, perspiration and sweating when triggered by reminder of the war zone. [Claimant] also reported the avoidant symptoms of putting a lot of energy and effort into trying not to think about the Iraqi war or how he felt when he was over there; avoiding reminders of the war zone like new stories of the war or some TV commercials; social isolation – does not want to be around other people even his roommate; feels emotionally numb.

(CX 2-18, 19). After undergoing a mental status examination, Claimant was diagnosed as follows:

AXIS I:	Post traumatic stress disorder Dysthymia by history
AXIS II:	Personality D/O nos with borderline traits by history Avoidant vs. schizoid personality characteristics by history

AXIS III: Arthralgia, Unspecified internal derangement of knee, Pain in joint involving shoulder region, migraines.  
AXIS IV: Psychosocial stressor: unemployment, interpersonal conflicts, exposure to early abandonment; history of drug and alcohol abuse, history of self mutilations, financial problems, separation from family, exposure to dangerous work environment (Iraqi war)  
AXIS V: Current GAF: 53

(CX 2-22).

Claimant had several subsequent visits at the VA hospital. On May 27, 2005, he was seen for “medication management.” (CX 2-15). Claimant also received therapy on June 9, 2005. (CX 2-12). On June 13, 2005, Claimant was seen by a member of the PTSD Clinical Team for medication management and supportive therapy for 45 minutes. He complained of anger and rage, and “obtained several new tattoos and piercing to ‘feel pain.’” (CX 2-3). The last document evidencing Claimant’s treatment at the VA hospital is dated August 30, 2005, and noted that he suffered from “chronic headaches,” and recounted Claimant’s active prescriptions: Fluoxetine, Quetiapine, Diazepam, Butalbital, Morphine, and Oxycodone. (EX 7).

*Medical records from Carol S. Thomas, LPC*

Ms. Thomas is Claimant’s counselor in South Carolina. Their first session occurred on June 27, 2005. Ms. Thomas noted that Claimant reported symptoms consistent with the following diagnosis:

1. Recurrent and intrusive distressing recollections of the traumatic event (the mortars being fired upon his unit)
2. Distressing dreams of the event
3. Intense psychological distress at exposure to cues that symbolize the event.
4. Avoidance of crowds
5. Diminished interest in significant activities – [Claimant] is very reclusive
6. Sleep disturbance
7. Outbursts of anger
8. Hypervigilance
9. Exaggerated startled response.

(CX 3-1).

*Dr. Sarah Book: Medical University of South Carolina*

Dr. Book is with the Medical University of South Carolina. On November 9, 2005, she completed an “Institute of Psychiatry Out Patient Data Base – Adult” form. Her handwritten notes detailed that Claimant had been diagnosed with PTSD in the past, and complains of “depressed mood for the past three weeks.” (CX 12-1).

Dr. Book detailed in the Summary/Formulation section that Claimant suffered from PTSD, and was on Prozac, Seroquil and Valium. Dr. Book also noted that Claimant suffered from chronic pain, and was taking narcotics. Dr. Book wrote:

[Claimant] saw action in Iraq as a civilian after 12 years of Army service. He sees Carl Thomas LPC [. . .] for psychotherapy & sees her every few weeks. He has been seeing her [approximately] 8 – 10 times. He says he has not had any narcotic in over a month. Nor has he had any Quetiapine (he says he has some coming in the mail.)

(CX 12-5).

*Independent Medical Evaluation: Dr. Cobb*

Dr. Cobb performed an Independent Medical Evaluation upon Claimant on September 15, 2005. (CX 6). Dr. Cobb noted that he was “asked to give [his] opinions on the nature and extent of any disability, including scope of medical care relating to work injuries sustained by [Claimant] in connection to his employment with [Employer]” because “[Claimant] is currently pursuing a claim alleging [PTSD] as a result of psychiatric injuries suffered while working for [Employer].” (EX 6).

Dr. Cobb noted that he considered the following information in drafting his evaluation:

1. Interview of [Claimant] on 8/31/05, at the Medical University of South Carolina, Forensic Psychiatry Center, lasting four hours.
2. Letter from the Law Offices of Laughlin, Falbo, Levy, and Moresi, LLP, requesting an Independent Medical Evaluation of [Claimant], Dated August 29, 2005
3. Medical records from Hampton Virginia Veteran’s Administration Medical Center for dates 3/22/04 to 6/10/05 including the following:
  - Progress notes from Terese Olszeski, MSN from the Posttraumatic Stress Disorders Clinical Team (PCT) Medication Management Clinic and co-signed by Walter A. Mostek, M.D., staff psychiatrist and Marinell Miller Mumford, Ph.D., psychologist, PTSD Clinical Team.
  - Post-Deployment Health Assessment complete by Gerry Haygood dated 1/25/05
  - Depleted Uranium Screening Questionnaire dated 1/25/05.
  - Adult Preventative and Chronic Care Flow Sheet dated 1/25/05.
  - Outpatient treatment records from 4/10/04 to 10/9/04.
  - Pre-Deployment Health Assessment completed by Manuel Flores, dated 3/22/04.

4. Treatment records from Rock Landing Psychologist Group dated from 02/28/08 to 05/23/05 from Robert J. Kelly, MSW, LCSW; medical support provided by Kelly Chun, M.D. psychiatrist.
5. Treatment records from the Charleston Veterans Administration Medical Benter from 07/18/05 to 08/30/05.
6. Treatment records from Carol Thompson, LPC from 06/27/05 to 09/01/05.

(EX 6).

Dr. Cobb rendered the following diagnosis:

- Axis I: Substance-Induced Anxiety Disorder with Panic Attacks  
Opiate Dependence  
Alcohol Abuse vs. Dependence<sup>3</sup>
- Axis II: Borderline Personality Disorder<sup>4</sup>
- Axis III: Bilateral Shoulder Impingement  
Bilateral Patellar Subluxation with surgical repair  
Choric Pain
- Axis IV: Moderate to Severe (unemployment, divorce, new living situation, legal charges)

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<sup>3</sup> Dr. Cobb explained that the diagnosis of Substance-Induced Anxiety Disorder is based on Claimant's history of substance abuse dating back to his teens. Additionally, the diagnosis of Opiate Dependence is based on Claimant's use of Fioricet, and upon Claimant's escalating use of narcotic pain medication. (EX 6). Dr. Cobb opined that Claimant's anxiety symptoms, including his escalating anger, are caused by his substance abuse and dependence. (EX 6). Dr. Cobb noted that a definitive diagnosis of Alcohol Abuse vs. Dependence cannot be made due to the lack of information. However, Dr. Cobb rendered the general diagnosis because Claimant "has a documented pattern of drinking large quantities of alcohol and has indicated he 'has a slight drinking problem.'" (EX 6).

<sup>4</sup> Dr. Cobb rendered a diagnosis of Borderline Personality Disorder because Claimant "reported a history of enduring patterns, since his teens, of poor impulse control, has externalized for his actions, and intense irritability and inappropriateness of emotional response." (EX 6). Dr. Cobb cited the following examples of Borderline Personality in Claimant:

1. A pervasive pattern of instability of interpersonal relationships, as described by his marital history and his description of leaving relationships.
2. Impulsivity in areas of alcohol consumption and opiate use.
3. Recurrent self-mutilating behavior, as demonstrated in his teens. He also made a suicidal gesture in his adulthood.
4. Affective instability marked by irritability and anxiety.
5. Inappropriate, intense feelings of anger, by his description.
6. Transient feelings of paranoia when under stress.

(CX 6).

(EX 6).

Dr. Cobb opined that “with a reasonable medical certainty, that [Claimant] does not have any diagnosed psychiatric condition that was caused, aggravated or precipitated by his employment in Iraq.” (EX 6). Dr. Cobb noted that Claimant’s symptoms were present prior to his employment with Employer and that “[t]hese symptoms have not changed significantly since his work with [Employer].” (EX 6). Dr. Cobb elaborated:

It is my opinion, with reasonable medical certainty, that [Claimant’s] Substance-Induced Anxiety Disorder with Panic Attacks, Opiate Dependence, Alcohol Abuse v. Dependence, and Borderline Personality Disorder were not exacerbated by his service with [Employer]. The symptoms of distress he reported as occurring after his employment with [Employer] are consistent with ongoing symptoms of the above disorders, all of which were pre-existing conditions.

(EX 6).

Dr. Cobb further opined to a reasonable medical certainty that Claimant does not suffer from PTSD. (EX 6). Dr. Cobb acknowledged that Claimant was exposed to rocket and mortar attacks while in Iraq, and that these are “potentially traumatic events.” (EX 6). However, Dr. Cobb opined that Claimant’s actions afterwards “were not consistent with someone fearful of their life.” (EX 6). Dr. Cobb also noted that Claimant “did not report any intrusive or distressing images, thoughts or dreams about the attacks in Iraq.” (EX 6). Claimant did report that thunder, jet fighters, military cargo jets and commercial jets did remind him of Iraq, and made him angry and anxious. However, Dr. Cobb opined to a reasonable medical certainty “that this is not a significant psychological reaction, and the fact that he had difficulty remembering what his cues were during my evaluation supports this opinion.” (EX 6).

Dr. Cobb noted that Claimant demonstrated hypervigilance during the exam. However, Dr. Cobb opined that “with reasonable medical certainty, that his reaction was due more to his general irritability and would not affect his ability to return to work.” (EX 6). Dr. Cobb also noted that Claimant demonstrated “significant irritability and anger.” (EX 6). Dr. Cobb elaborated:

However it is my opinion they are better accounted for by his personality disorder and other Axis I diagnoses related to his substance use, rather than his diagnosis of PTSD. [Claimant] has a history of being able to function at a high level with his diagnosis.

(EX 6).

Dr. Cobb opined with reasonable medical certainty that Claimant’s “symptoms of mental illness do not impair his ability to return to employment.” (EX 6). Dr. Cobb elaborated:

[Claimant's] symptoms have been persistent throughout his vocational history and he has been able to sustain gainful employment, functioning at a high level. While his symptoms may cause him some distress, they should not impair his return to employment.

(EX 6).

Dr. Cobb further opined that Claimant has not reached Maximum Medical Improvement (MMI). (EX 6). Dr. Cobb noted that Claimant would continue to benefit from treatment. (EX 6).

*Supplemental Medical Report of Dr. Cobb*

Dr. Cobb submitted a supplemental Independent Medical Evaluation on November 15, 2005. (EX 9). Dr. Cobb noted that he was provided additional records from the Veterans Administration on November 10, 2005, concerning Claimant's treatment from April 12, 2002 until August 30, 2005. (EX 9-1). Dr. Cobb was asked to explain how these records would change or augment his previous report. (EX 9-1).

Dr. Cobb detailed that these notes revealed that Claimant had previously used narcotics for chronic pain, and had pre-existing treatment for depression. (EX 9). Dr. Cobb opined:

After reviewing the new medical records provided, it is my opinion, within a reasonable degree of medical certainty, that there is evidence to augment the diagnoses of Opiate Dependence and Borderline Personality Disorder made in my initial assessment of [Claimant]. The following evidence supports this opinion:

*Opiate Dependence*

There are multiple notations in [Claimant's] medical records of concern of his use of narcotic pain medication.

His dose increases over time, indicating tolerance to medications.

He is noted to use more medication than is prescribed, causing him to run out early and request refills.

There were attempts to wean [Claimant] from narcotic pain medication and to use alternative treatments for his pain management.

*Borderline Personality Disorder*

There is further description of self-mutilating behavior that occurred until recently. He also described thoughts of suicide when his girlfriend was deployed to Kuwait.

[Claimant] described 'dissociative episodes' and paranoia which are a symptom of Borderline Personality Disorder.

He described how his mood was tied to his relationships, suggesting identity disturbance and difficulty with interpersonal relationships.

(EX 9-4).

Dr. Cobb also noted that he reconsidered the diagnosis of PTSD “in light of the new information provided.” (EX 9-4). Dr. Cobb noted that Claimant had depression prior to working for Employer:

One episode was described as occurring during the Gulf War. He denied any nightmares of the Gulf War, but did acknowledge some avoidance and hypervigilance. It was felt he should be further evaluated for PTSD. However, the diagnosis of PTSD was not made, but rather Dysthymia and Personality Disorder, Not Otherwise Specified, with Borderline Personality Traits as well as Avoidant vs. Schizoid Personality Traits. He also reported feelings of anxiety prior to his deployment with [Employer] as ‘a constant knot in his stomach.’ This is evidence that some of the symptoms he described post employment for [Employer]; anxiety, paranoia, avoidance of others and hypervigilance, were present prior to his working in Iraq for [Employer].

I was asked to comment on whether any preexisting disabilities, when combined with any new industrial injury, great a level of disability greater than would be expected from the new disability alone. In light of the new information provided, it is my opinion, with a reasonable degree of medical certainty, that while stress plays a role in the exacerbation on Borderline Personality Disorder, and [Claimant] was under stress during his work with [Employer] in Iraq, there were several other contributing factors. These include unhappiness with his employer and marital discord. It is my opinion, within a reasonable degree of medical certainty, that [Claimant’s] experiences with [Employer] did not alter the natural course of any preexisting disability.

(EX 9-5).

*Testimony of Dr. Thomas Cobb*

Dr. Cobb is a board certified forensic psychiatrist.<sup>5</sup> (TR. at 68). Dr. Cobb evaluated Claimant on August 31, 2005, for approximately four hours. (TR. at 70). Dr. Cobb testified that he had considered records prior to his meeting with Claimant:

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<sup>5</sup> Dr. Cobb explained forensic psychiatry:

Forensics is different from general psychiatry in that forensics looks at where psychiatry and the law cross. So, basically, there’s somebody who has a mental disorder and is anywhere within the legal process and it’s felt that an expert opinion may benefit the court in making a decision that’s where forensic psychiatrist would come in. Where as somebody come to, say, a clinician their first order of business is to help that person with whatever symptoms they report you take that person at face value and try to help them. Whereas a forensic psychiatrist is somewhat more of an investigator collecting a lot more collateral data, taking a look at longitudinal history to try and answer whatever questions are placed before them.

The records that I had available to me at the time were treatment records from the Veterans Administration, from the Hampton, Virginia Veteran's Administration Center, treatment records from the Rock Landing Psychologist Group, some treatment records from the Charleston Veterans Administration Center and some treatment records from Carol Thomas, LPC here in Charleston, South Carolina.

(TR. at 71). Dr. Cobb noted that some of these were pre-deployment records. (TR. at 71). Dr. Cobb testified that he has considered additional records since his evaluation of Claimant. (TR. at 72).

Dr. Cobb testified that he was aware that Claimant alleges to suffer from PTSD injury in connection with his employment with Employer in Iraq. (TR. at 72). However, Dr. Cobb opined that, based on his evaluation and review of the records, "with a reasonable degree of certainty that [Claimant] does not suffer from post-traumatic stress disorder, but rather other diagnoses." (TR. at 72). Dr. Cobb defined PTSD:

[PTSD] is classified as an anxiety disorder in which certain criteria have to be fulfilled. The first criteria is Criteria A which is where there has to be some traumatic event in which there is threatened life or danger to somebody. Many times that's easily met by somebody being in a situation.

However, Criterion 2 a lot of times, which is taken for granted, is the person's reaction to that particular stressor. The reaction has to be one of intense fear or life. So, that would be the stimulus that would create the disorder.

Based on that experience then somebody would have symptoms after that, such as re-experiencing the trauma, including nightmares, vivid visions, flashbacks, distressing psychological and physiological symptoms based on remembering the traumatic event.

They also have avoidance systems where they would avoid trying to remember the event itself. Difficulty remembering details, avoiding things that remind them of the trauma. They also would have things, such as a feeling estrangement from other people. Kind of an avoidant behavior of other people. And there are symptoms that include arousal, such as increased startle response or sleep, anger, irritability. Some disassociative type episodes, which is an episode where somebody kind of is in a dream state and can't really stay focused on the time period at hand. So, all of those certain criteria, certain numbers of criteria, have to be met in order for somebody to have a diagnosis of [PTSD].

(TR at 72-3). Dr. Cobb noted that one can not be diagnosed with PTSD without meeting this required criteria. (TR. at 73).

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(TR. at 70).



Dr. Cobb opined “with a reasonable degree medical certainty that [Claimant] does not meet the criteria for [PTSD].” (TR. at 74). Dr. Cobb explained how Claimant fails to meet these criteria:

One of the biggest sticking points in my evaluation and looking at him is that he did have symptoms consistent with anxiety and [PTSD]. However, as I mentioned in Criterion A, Part 2, somebody’s reaction to the trauma has to be that of poor and have an extreme reaction to the trauma. Based on what [Claimant] reported to me his reaction to the trauma which he identified as one particular event which was a mortar round that had occurred which was the third one that landed close to their camp that made him fear for his life.

He made that statement to me. I stepped out of a trailer and I saw an orange glow and that was the moment that I feared for my life and I ducked into the bunker, was cowering with fear, which sounds like somebody having a response to horror. However, after that [Claimant] proceeds to go back to his trailer and later go on back to work.

After hearing that, my interpretation of that is that it’s a normal response for somebody to have faced something like that – for instance, an analogy would be a police officer in the line of duty who was shot at, it would be normal for him to duck for cover, adrenaline pumping, having fear. But then returning to duty and going about his business. This was one description of what [Claimant] gave to me.

He later on continues to work in Iraq. Goes on a vacation. Has discussions about – or he told me that he had even considered extending his time in Iraq, which to me did not indicate that his response to that traumatic event that he identified was one that would trigger something like [PTSD].

He mentioned that when he realized that he was being affected by the trauma when he was in Hawaii on vacation – I apologize – when he returned to the states and he had to deal with – I’ll use his quote – “jackasses on the road,” basically talking about road rage, which doesn’t necessarily have to do anything with the trauma in Iraq.

So, in essence I felt that he did not meet that Criterion B. He also described that upon returning from his vacation he was upset that he was not given his vacation in an appropriate manner. He had to wait nine months for his vacation and basically his work had piled up to the point that there were a lot of work orders left around and when he came back that sent him through the roof and he was very upset.

I felt that there was more of a significant stressor to him as far as leaving [Employer], rather than the mortar round that came in. Plus the many mortars that

he said had come in over time. Although he did identify one specific one as being traumatic.

(TR. at 76).

Dr. Cobb noted that Claimant suffered from some possible symptoms of PTSD, such as fear of crowds, hypervigilance, and anxiety. Dr Cobb testified that he did not feel that Claimant had either lied or exaggerated during his medical evaluations. (TR. at 95). However, Dr. Cobb opined that these are related to another psychiatric disorder suffered by Claimant:

In particular, my diagnosis of [Claimant] were substance induced anxiety disorder with panic attacks, which is a disorder related to substance dependence which increases anxiety. Opiate dependence, alcohol abuse versus dependence, I didn't have enough information to say whether or not he was actually dependent on alcohol. And also borderline personality disorder.

(TR. at 81-2). Dr. Cobb opined that Claimant suffered from these disorders prior to his employment with Employer, that these disorders were maintained throughout his employment, and that Claimant still suffers from them. (TR. at 84).

Dr. Cobb opined about the diagnoses rendered by Mr. Kelly and Mr. Whitaker:

I felt that – and it's my opinion, that the diagnoses were not substantiated by their notations and records. Many times what can happen is that once a diagnosis is placed on the record that it can be taken for granted that the doctor at some point has written down post-traumatic stress disorder, or somebody may take that as a diagnosis.

The other thing is that as a clinician, and I would be acting in the same way if somebody came to me for treatment and reported certain symptoms to me, I would take that information and do my best to treat that person for those symptoms. If they reported to me that they were suffering a trauma, or had suffered a trauma and were experiencing these things, my working diagnosis might possibly [PTSD].

(TR. at 90). Dr. Cobb also offered an opinion of Ms. Thomas' diagnoses:

I believe it was the day before yesterday I was given some records concerning Ms. Thomas' treatment of [Claimant]. It was basically a letter stating that her diagnoses – she felt that [Claimant] was suffering from [PTSD] and that this diagnosis was based on his history to presenting symptoms of exaggerated startle response, concentration difficulty, hyper-vigilance. Which are all symptoms that [Claimant] has reported and I believe are true in [Claimant]. However, that in of itself does not make a diagnosis of [PTSD]. Those particular symptoms are only mentioned in Criteria D of making a diagnosis of [PTSD].

(TR. at 91).

Dr. Cobb testified that Dr. Book's records do not amount to a diagnosis of PTSD. Rather, it is an intake:

It is a description of a patient coming to her, describing symptoms, asking for help and she then goes on to make a working diagnosis of [PTSD], major depressive disorder and chronic pain. In my opinion it is a – as I've mentioned – basically a reference point to start from. Somebody comes to you for help. They report these symptoms to you. You are not necessarily – your first instinct as a clinician in helping somebody is not to challenge the veracity of what somebody is saying, but to help them.

(TR. at 92).

Dr. Cobb testified that Claimant has not suffered any impairment to his ability to work as a result of his employment with Employer. (TR. at 92-3). Dr. Cobb explained specifically that "the natural course of [Claimant's] disorders, he has been able to function in a work setting and that he still could function in a work setting. It's just a matter of what that particular setting is." (TR. at 110). However, Dr. Cobb acknowledged on cross that, with Claimant's particular diagnosis of substance induced anxiety, he should not go back to a war zone. (TR. at 111). Dr. Cobb testified that his reservations about Claimant's ability to work are not the result of any injury Claimant could have suffered while working in Iraq. (TR. at 123).

Dr. Cobb acknowledged on cross that he felt Claimant legitimately had a problem. Dr. Cobb listed Claimant as between 61 to 70 on a DMS4 global assessment of functioning [GAF] scales<sup>6</sup>. Dr. Cobb explanation that this indicated that Claimant has "psychiatric symptoms that are disruptive to [him]. They may interfere with their social or occupational functioning at the time." (TR. at 98). Dr. Cobb explained that his opinion:

[I]s based on my evaluation of him. In general when you give a [GAF] you give it, as when I made my diagnosis, is what my opinion at that time as far as his diagnosis and as far as his [GAF].

(TR. at 100). Dr. Cobb noted that Mr. Kelly gave Claimant a GAF of 40, which corresponds with "significant impairment and in general when somebody has a [GAF] under 50 one should be considered for hospitalization." (TR. at 98). Additionally, the VA hospital assigned a GAF of 53, which indicates "significant symptoms." (TR. at 98).

Dr. Cobb acknowledged that Claimant purports to be drinking more, and takes an increased number of medications since his return from Iraq. (TR. at 100-1). Dr. Cobb testified that the problems Claimant had in Iraq could have aggravated his substance induced anxiety.

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<sup>6</sup> Dr. Cobb testified, "DMS 4 is a guideline for making diagnosis, psychiatric diagnosis. It's a book that has been created by consensus of psychiatric experts as to what constitutes particular diagnosis." (TR. at 96). "A global assessment of functioning scale is basically a number indicating – on a scale of 1 to 100 indicating where somebody is functioning," and addresses social, occupational and educational concerns. (TR. at 97).

(TR. at 108). Dr. Cobb explained that “[i]n general stress will exacerbate any psychiatric condition.” (TR. 108-9). Dr. Cobb elaborated in the following testimony:

Q: So, the backlog go printers, or computers, when he came back from Hawaii was stressful enough that it’s going to aggravate the pre-existing substance induced anxiety?

A: Yes, that’s possible.

Q: And the mortar attack which landed 50 yards, or 50 feet, from his camp, that’s stressful enough to have aggravated these substance abuse anxiety?

A: Yes.

Q: In fact, in your subsequent report of November 15, 2005, you actually indicate that it’s your opinion with a reasonable degree of medical certainty that while stress plays a role in the exasperation on borderline personality disorders and [Claimant] was under stress during his work with [Employer] in Iraq, there were several other contributing factors, correct?

A: Yes, that’s correct.

Q: That’s within a reasonable degree of medical certainty?

A: Yes, it is.

(TR. at 109).

### Analysis

#### *Section 20(a) Presumption*

Section 20(a) of the Act provides the claimant with a presumption that his condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff’d*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once claimant has invoked the presumption, the burden of proof shifts to employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the

course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984); *Kelaita*, *supra*. Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Id.* Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982).

Employer argues that Claimant is not entitled to the Section 20 (a) presumption because Claimant "has not offered the necessary medical evidence to support this claim." (Employer's brief at 5). Specifically, "[C]laimant has not produced any evidence from a qualified physician supporting or establishing a compensable injury." *Id.* Employer asserts that "[w]ithout an opinion from a qualified physician, as defined by the Act, is no evidence to support that [Claimant] has suffered a compensable injury." *Id.* at 8.

Employer's argument notwithstanding, Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of harm in a Section 20(a) analysis. *See Sylvester*, 14 BRBS at 236 (1981). Regardless of whether Claimant has been properly diagnosed with PTSD by a qualified physician, he has certainly credibly testified to a mental harm. Claimant specifically testified that he suffers from "anxiety [. . .] hyper-vigilance and just a complete loss of everything." (TR. at 53). Claimant's medical records subsequent to his time in Iraq consistently record that Claimant continues to suffer from extreme anxiety, and an unstable mental health. (CX 1, 2, 3). Notably, even Dr. Cobb testified that he felt that Claimant's complaints of symptoms were credible, and diagnosed Claimant with "Substance-Induced Anxiety Disorder with Panic Attacks." (TR. at 95; EX 6). As such, I find that Claimant has sufficiently established that he suffers a harm.

In order to successfully invoke the section 20(a) presumption, Claimant must also demonstrate the existence of working conditions or circumstances that could have caused his injury. *United States Industries/Federal Sheet Metal*, 455 U.S. at 615; *Kelaita*, 13 BRBS at 331. To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. *Kelaita*, 13 BRBS at 331; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

In the present case, Claimant credibly testified about stressful working conditions during his time in Iraq. Claimant testified about mortar attacks, especially one that landed approximately fifty feet from his location. (TR at 26-7). Claimant also noted the difficulty in getting ballistics gear, and problems he had with a supervisor. (TR. at 29-30). Claimant also detailed the backload of work that he found upon his return from his trip to Hawaii. (TR. at 31). Claimant's testimony successfully establishes stressful working conditions while he was in Iraq on behalf of Employer. Therefore, I find that Claimant has met his burden that conditions existed at work, which could have caused, aggravated, or accelerated his mental harm.

Claimant has sufficiently established that he sustained a harm and that stressful conditions existed at work under Employer, which could have caused the harm. As such I find that Claimant is entitled to the benefit of the Section 20(a) presumption.

### *Rebuttal of Section 20(a) Presumption*

Once the presumption is invoked, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence which establishes that the claimant's employment did not cause, contribute to or aggravate his condition. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. *E & L Transport Co., v. N.L.R.B.*, 85 F.3d 1258 (7th Cir. 1996).

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by § 20(a). See *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). Rather, the presumption must be rebutted with specific and comprehensive medical evidence proving the absence of, or severing, the connection between the harm and employment. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's condition was not caused or aggravated by his employment. *Rajotte v. General Dynamics Corp.*, 18 BRBS 85 (1986).

In rebuttal, Employer offers the opinion of Dr. Cobb, who opines that Claimant has not suffered any injury or aggravation of a pre-existing injury as a result of his employment with Employer. Dr. Cobb specifically opined that Claimant has neither suffered PTSD nor any other psychiatric injury as a result of his employment with Employer. (TR. at 74; 84). Dr. Cobb opined that "with a reasonable medical certainty, that [Claimant] does not have any diagnosed psychiatric condition that was caused, aggravated or precipitated by his employment in Iraq." (EX 6). Dr. Cobb noted that Claimant's symptoms were present prior to his employment with Employer and that "[t]hese symptoms have not changed significantly since his work with [Employer]." (EX 6).

However, Dr. Cobb also testified that the stress Claimant endured while in Iraq and employed by Employer could have aggravated his substance induced anxiety condition. (TR. at 108). Despite this admission, Dr. Cobb has failed to effectively explain why Claimant's time in Iraq on behalf of Employer did not actually aggravate Claimant's mental health problems. Rather, Dr. Cobb merely seems to conclude, without explanation, that Claimant's problems were not aggravated by his employment in Iraq.

There seems to be no doubt that Claimant suffered from pre-existing mental health problems prior to his employment with Employer. Notably, Claimant has presented sufficient evidence to invoke the presumption that his employment with Employer at least aggravated his mental health condition. Dr Cobb's wavering opinion does not constitute substantial countervailing evidence necessary to rebut the finding that Claimant's employment did not cause, contribute to or aggravate his current condition. As Employer has failed to offer any other rebuttal evidence, I find that Employer has not met its burden. As such, I find that Claimant suffers a compensable injury.

## *Nature and Extent of Disability*

Disability under the Act means, “incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment.” 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. The traditional method for determining whether the injury is permanent or temporary is the date of maximum medical improvement. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235, fn. 5 (1985); *Trask*, 17 BRBS at 60; *Stevens v. Lockheed Shipbuilding Company*, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record and is not dependant on economic factors. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122 (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979). Where the medical evidence indicates that the claimant’s condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Dixon v. Cooper Stevedoring Co.*, 18 BRBS 25, 32 (1986). However, the mere possibility of surgery, by itself, does not preclude a finding that claimant’s condition is permanent. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986).

There is no evidence in the record that Claimant has reached MMI. In fact, Dr. Cobb specifically opined that Claimant has not reached MMI. (EX 6). As such, I find that Claimant is entitled to temporary disability benefits.<sup>7</sup>

The question of extent of disability is an economic as well as a medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corporation*, 25 BRBS 128, 131 (1991). To establish a *prima facie* case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant’s credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In addition, claimant’s credible testimony of the constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation notwithstanding considerable evidence that claimant can perform certain types of work activity.

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<sup>7</sup> On October 3, 2005, Employer filed a petition for Section 8(f) relief. However, such relief is only permitted in cases of permanent disability. As the present case involves only temporary disability benefits, Section 8(f) relief is inappropriate, and Employer’s request is premature.

*Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78, (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the administrative law judge and may not be disturbed if it is supported by the evidence. *Id.* at 945, 81.

There is sufficient evidence in the record that Claimant is unable to return to his regular employment due to his disability. Usual employment is the claimant's regular duties at the time that he was injured. Claimant's regular employment in the present case is not just a computer technician, but one working in a war zone. Claimant specifically testified that he would not be able to return to work in Iraq. (TR. at 54). Dr. Cobb agreed that Claimant should not return to work in a war zone, in light of his diagnosis of substance induced anxiety. (TR. at 111). I therefore find that Claimant has shown that he is unable to return to his regular or usual employment, and has thus made a *prima facie* case of total disability.

Once Claimant establishes that he is unable to do his usual work, he has established a *prima facie* case of total disability and the burden shifts to Employer to establish the availability of suitable alternative employment which Claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1032 (5th Cir. 1981). In order to meet this burden, Employer must show the availability of job opportunities within the geographical area in which he was injured or in which Claimant resides, which he can perform given his age, education, work experience and physical restrictions, and for which he can compete and reasonably secure. *Turner*, 661 F.2d at 1042-43; *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 667, 671 (5th Cir. 1986); *Mijangos v. Avondale Shipyard, Inc.*, 19 BRBS 165 (1986). A job provided by Employer may constitute evidence of suitable alternative employment if the tasks performed are necessary to Employer and if the job is available to Claimant. *Peele v. Newport News Shipbuilding & Dry Dock*, 18 BRBS 224, 226 (1987); *Wilson v. Dravo Corp.*, 22 BRBS 463, 465 (1989); *Beulah v. Avis Rent-A-Car*, 19 BRBS 131, 133 (1986). Moreover, Employer is not actually required to place Claimant in alternate employment, and the fact that Employer does not identify suitable alternative employment until the day of the hearing does not preclude a finding that Employer has met its burden. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-237 n.7 (1985). Nonetheless, the Administrative Law Judge may reasonably conclude that an offer of a position within Employer's control on the day of the hearing is not bona fide. *Diamond X Drilling Co. v. Marshall*, 577 F.2d 1003, 1007-09 n.5 (5th Cir. 1979); *Jameson v. Marine Terminals*, 10 BRBS 194, 203 (1979).

Employer has failed to offer any evidence of suitable alternate employment. As such, I find that Claimant to be temporarily and totally disabled from January 17, 2005 to the present and continuing.

The parties stipulated that Claimant's average weekly wage at the time of injury was \$2,174.44,<sup>8</sup> yielding a compensation rate of \$1,449.63 (2/3 X \$2,174.44). However, Section 906(b)(1) of the Act states that "[c]ompensation for disability or death [ . . . ] shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage [ . . . ]." 33 U.S.C. § 906(b)(1). 10. 33 U.S.C. § 910(f). Each year, the Secretary of Labor recalculates the

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<sup>8</sup> JX 1.



NAWW and 200 percent of this amount becomes the new statutory maximum compensation rate on October 1. 33 U.S.C. § 906(b)(3). The maximum compensation rate in effect on January 21, 2005 was \$1,047.16.<sup>9</sup> 33 U.S.C. § 910(f). As such, I find that Claimant is entitled to the maximum compensation rate as of the date of his disability, \$1,047.16, for the period of January 21, 2005 through the present and continuing.

### ORDER

Accordingly, it is hereby ordered that:

1. Employer, Mantech International Corporation, is hereby ordered to pay to Claimant, Scott Ridley, temporary total disability benefits for the period of January 21, 2005, through the present and continuing at the maximum compensation rate of \$1,047.16.
2. Employer is hereby ordered to pay all medical expenses related to Claimant's work related injuries;
3. Employer shall receive credit for any compensation already paid;
4. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984);
5. Claimant's attorney, within 20 days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD E. HUDDLESTON  
Administrative Law Judge

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<sup>9</sup> It is further noted in this regard that subsection 6(b)(3) expressly contemplates that persons receiving only temporary disability benefits will not be entitled to annual increases in their compensation payments, but that such increases will be paid to persons currently receiving permanent total disability benefits. See *Puccetti v. Ceres Gulf*, 24 BRBS 25 (1990).